

Case Nos. 18-2416 and 18-2661

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: NATIONAL FOOTBALL PLAYERS'
CONCUSSION INJURY LITIGATION

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN CASE
NO. 2-12-MD-02323 ANITA B. BRODY, U.S. DISTRICT JUDGE

**OPENING BRIEF FOR APPELLANT
KREINDLER & KREINDLER, LLP**

ANTHONY TARRICONE
KREINDLER & KREINDLER LLP
855 Boylston Street, Suite 1101
Boston, Massachusetts 02116
(617) 424-9100
atarricone@kreindler.com

*Attorneys for Appellant
Kreindler & Kreindler, LLP*

TABLE OF CONTENTS

STATEMENT OF JURISDICTION.....	1
ISSUES PRESENTED.....	1
RELATED CASES AND PROCEEDINGS.....	2
STATEMENT OF THE CASE.....	2
The Communications-Public Relations Committee’s Efforts.....	2
The Common Benefit Fee Allocation Submission.....	11
The Common Benefit Fee Allocation Order	14
SUMMARY OF ARGUMENT	15
STANDARD OF REVIEW	16
ARGUMENT OF JOINT APPELLANTS	16
ARGUMENT OF KREINDLER & KREINDLER LLP	16
I. THE DISTRICT COURT EMPLOYED AN IMPROPER ALLOCATION STANDARD, FAILING TO CONSIDER THE RISK FACTOR IN DETERMINING MULTIPLIERS, INCLUDING THAT OF KREINDLER..	17

II. THE COURT CREATED NO RECORD AND ISSUED NO RULING ON
KREINDLER’S OBJECTIONS TO SEEGER’S DEMAND TO EXCLUDE
SOME COMMON BENEFIT TIME FROM ITS LODESTAR.21

CONCLUSION22

CERTIFICATE OF BAR MEMBERSHIP24

CERTIFICATE OF COMPLIANCE25

TABLE OF CITATIONS

Federal Cases

<i>Glaberson v. Comcast Corp.</i> , No. CV 03-6604, 2016 WL 6276233 (E.D. Pa. Oct. 27, 2016)	18
<i>Goldberger v. Integrated Resources, Inc.</i> , 209 F.3d 43 (2d Cir. 2000)	19
<i>In re Copley Pharm., Inc., Albuterol Prod. Liab. Litig.</i> , 50 F. Supp. 2d 1141 (D. Wyo. 1999)	18
<i>In re Diet Drugs</i> , 582 F.3d 524 (3d Cir. 2009)	19
<i>In re High Sulfur Content Gasoline Products Liability Litigation</i> , 517 F.3d 220 (5th Cir. 2008)	17
<i>In re NASDAQ Market-Makers Antitrust Litig.</i> , 187 F.R.D. 465 (S.D.N.Y. 1998)	19
<i>In re Trans Union Corp. Privacy Litig.</i> , No. 00 C 4729, 2009 WL 4799954 (N.D. Ill. Dec. 9, 2009)	18
<i>In re Vitamins Antitrust Litig.</i> , 398 F. Supp. 2d 209 (D.D.C. 2005)	18
<i>Interfaith Community Org. v. Honeywell Intern., Inc.</i> , 426 F.3d 694 (3d Cir. 2005)	1
<i>Lindy Bros. Builders, Inc. of Phila. v. Am. Rad. & Std. Sanitary Corp.</i> , 540 F.2d 102 (3d Cir. 1976)	17, 18

Federal Statutes

28 U.S.C. § 1291	1
28 U.S.C. § 1332(d)	1

Federal Rules

Federal Rule of Civil Procedure 2317

Other Authorities

Manual for Complex Litigation, Fourth, § 14.1117

STATEMENT OF JURISDICTION

The district court had original jurisdiction over this matter pursuant to 28 U.S.C. § 1332(d). This brief addresses the May 24, 2018, order of the district court allocating common-benefit attorney fees. JA84; JA8971. That ruling constitutes a final order subject to immediate appeal over which this Court has jurisdiction pursuant to 28 U.S.C. § 1291. *See Interfaith Community Org. v. Honeywell Intern., Inc.*, 426 F .3d 694, 702-703 (3d Cir. 2005). Kreindler & Kreindler LLP (“Kreindler”) filed a timely notice of appeal following the court’s issuance of the order appealed from. JA19.

ISSUES PRESENTED

Kreindler hereby adopts the Joint Appellants’ Statement of Issues Presented set forth in the Joint Opening Brief of Appellants and Opening Brief Appellant Locks Law Firm Addressing the Common Benefit Fee Allocation Order (“Joint Opening Brief”). Doc. 003113316560, p. 1.

In addition to the Joint Appellants’ Statement of Issues Presented, Kreindler sets forth the following Issue relating to its treatment in the Common Benefit Fee Allocation Order:

Did the district court employ a legally erroneous standard, rely on clearly erroneous factual findings, and abuse its discretion when it approved Mr. Seeger’s proposed award to Kreindler & Kreindler LLP, which improperly set the firm’s

multiplier unfairly low, where Kreindler partner Anthony Tarricone conceived of, managed and coordinated the plaintiffs' public relations strategy and chaired the Plaintiffs' Communications-Public Relations Committee?

Kreindler objected to the fee allocation process and the fee award Mr. Seeger proposed, JA8095-JA8121. The court rejected these objections in the Common Benefit Fee Allocation Order. JA84, JA97; JA8971, JA8984.

RELATED CASES AND PROCEEDINGS

Kreindler hereby adopts the Joint Appellants' Statement of Related Cases and Proceedings set forth in the Joint Opening Brief. Doc. 003113316560, p. 2.

STATEMENT OF THE CASE

Kreindler hereby adopts the Joint Appellants' Statement of the Case set forth in the Joint Opening Brief. Doc. 003113316560, pp. 3-15.

In addition to the Joint Appellants' Statement of the Case, Kreindler sets forth the following Facts, relating to its award in the Common Benefit Fee Allocation Order.

The Communications-Public Relations Committee's Efforts

On April 26, 2012, Judge Anita Brody of the Eastern District of Pennsylvania appointed a Plaintiffs' Steering Committee (hereinafter the "PSC") in this MDL, which included Kreindler partner Anthony Tarricone, Esq. JA721-22. The PEC appointed Mr. Tarricone to co-chair the Plaintiffs' Communications-

Public Relations Committee (“PR Committee”), which was integral in influencing the NFL to negotiate an unprecedented settlement that would end the litigation without a single deposition or document production. JA8095-96.

When the NFL litigation was in its infancy, the league undertook a public relations campaign designed to discredit the science that drew a connection between concussions and repetitive head trauma and the myriad of illnesses and conditions that plaintiffs claimed in their lawsuits. JA8097. The NFL’s public relations machine went into overdrive defending itself in the court of public opinion. JA8097.

Even before the Court’s appointment of the PSC, Mr. Tarricone spoke with Sol Weiss, who was a leader of the litigation against the NFL and would ultimately be appointed Co-Lead Counsel, to devise a plan to counter the well-funded NFL publicity machine. JA8097.

At the time, Mr. Tarricone had recently finished working as the appointed Co-Chair of Communications for the Plaintiff’s Executive Committee in the BP Deepwater Horizon Oil Spill litigation in Eastern District of Louisiana. JA8097-98. In the BP case, the committee was recognized as playing a critical role in countering BP’s multi-million dollar publicity campaign by educating the public about the true extent of the impact of the oil spill on the Gulf Coast region. JA8098. Mr. Weiss was also familiar with Mr. Tarricone’s experience working to

influence public opinion during Mr. Tarricone's tenure as President of the American Association of Justice, to defeat efforts to take away patients' rights as part of the Affordable Care Act. JA8098.

Mr. Tarricone devised a coordinated communications strategy that involved partnering with public relations professionals to vet every media inquiry, push stories of interest to media outlets, develop effective messaging, and work with retired NFL players and their families to help tell their stories. JA8098. This effort was designed to influence the dynamics of the litigation by (1) educating the public about the science of traumatic brain injury (TBI) and its effect on players and their families after their NFL careers ended, and (2) countering the NFL's campaign to demonize players who sued the NFL by dispelling inaccurate facts and myths. JA8098.

Even before formation of the PSC, Mr. Weiss asked Mr. Tarricone to lead the public relations campaign for the plaintiffs, and announced Mr. Tarricone's role at an organizational meeting of plaintiffs' lawyers in Philadelphia on February 21, 2012. JA8098-99. At that meeting, Mr. Tarricone outlined the strategic plan he envisioned. JA8099. Bruce Hagen and Mike McGlamry were also selected to serve with Mr. Tarricone on a Communications-Public Relations Committee (hereinafter the "PR Committee"). JA8099. Shortly thereafter, Mr. Weiss appointed Steve Marks of Podhurst Orseck, P.A. to co-chair the committee with Mr. Tarricone.

JA8099. Mr. Tarricone and Mr. Marks worked closely in all matters concerning the plaintiffs' strategic communications campaign. JA8099.

Immediately after the February 21, 2012, meeting, Mr. Tarricone began recruiting an experienced and knowledgeable public relations firm. JA8099. The press and media coverage was very negative, and plaintiffs urgently needed someone to professionally handle media inquiries. JA8099. By Monday February 27, 2012, Mr. Tarricone had found the firm plaintiffs would eventually retain, CLS. JA8099.

Mr. Tarricone organized a formal Request for Proposal (RFP) process that several PR firms participated in, which resulted in the PSC formally retaining CLS in mid-May. JA8099. On May 22, 2012, Mr. Tarricone arranged and led a meeting of the PR Committee leadership and the CLS team at the CLS office in Washington, D.C. JA8099. At the meeting, the group refined the plaintiffs' communications strategy and planned for the "rollout" of a media campaign to coincide with filing of the Master Administrative Complaint in early June. JA8099. This "rollout" required extensive planning and preparation in a short period of time, even though CLS had already been engaged in the project since March 2012. JA8099.

Once the PR Committee retained CLS, it had to control and coordinate all media/press inquiries made to any plaintiff's lawyer in the litigation. JA8100. The

PR Committee also began developing cogent, dynamic messaging about the litigation, which was revised and adapted as needed during the life of the case. JA8100. The PR Committee performed background briefings and interviews with media and press professionals who were covering the NFL lawsuit or writing stories about the effect of traumatic brain injury on student and professional athletes. JA8100. The PR Committee identified retired NFL players and family members who could effectively tell their stories about the true impact of TBI on the retired players and their families. JA8100. Finally, the PR Committee facilitated press and media opportunities for educating the public about how the lives of retired players and their families had been and continued to be affected by repetitive head trauma playing NFL football. JA8100.

Virtually every piece of information given to the media, and every person who provided that information, came through the PR Committee led by Mr. Tarricone. JA8100. Only by carefully regulating the message, and keeping control on the flow of information, were thousands of players and dozens of attorneys able to speak with one voice. JA8100. It was a monumental undertaking that produced nearly daily news coverage telling the plaintiff's stories and educating the public about the effects of repetitive head trauma. JA8100. The extraordinary success of this intensive, coordinated effort culminated in the settlement, and was a direct result of Mr. Tarricone and the PR Committee's work.

A brief summary of the work Mr. Tarricone and the PR Committee performed, in devising, orchestrating and overseeing the plaintiffs' PR strategy, includes:

- a. After the plaintiffs' organizational meeting on February 21, 2012, Mr. Tarricone personally recruited CLS, the public relations firm that was eventually retained and continued to serve throughout the litigation and settlement process. JA8100.
- b. Mr. Tarricone drafted the Request for Proposal for retention of a PR firm on April 26, 2012, cleared it with Mr. Weiss and others, and sent it to a select group of qualified PR firms on May 1, 2012. JA8101.
- c. Mr. Tarricone coordinated the scheduling of interviews for all of the firms that submitted proposals in early May 2012, and CLS was formally selected on May 16 to serve as the plaintiffs' PR professionals. JA8101.
- d. Mr. Tarricone negotiated the terms of a contract with CLS. JA8101.
- e. In the first days after CLS was formally retained, the PR Committee began working on a strategic plan that focused on using the anticipated filing of the Master Administrative Complaint as a "newsworthy" event to engage interest on the part of the national media and educate the public about the litigation through the stories of retired players and their families. JA8101.

- f. Mr. Tarricone and Mr. Marks arranged weekly meetings of the PR Committee and a second weekly meeting of a core group that consisted of Mr. Tarricone, Mr. Marks, Mr. Weiss, Mr. Seeger and the CLS team. JA8101-02. In these smaller meetings important decisions were made concerning the PR Committee's strategic plan. JA8102.
- g. On May 31, 2012, the PR Committee sent a formal Media Protocol to all PSC/PEC members, setting forth mandatory procedures for all media/press inquiries. JA8101. The PR Committee established a special email address for media inquiries, and required all inquiries to be submitted to the committee and CLS for vetting and handling. JA8101. Consistent with the plan laid out by Mr. Tarricone at the organizational meeting in February 2012, the purpose of the protocol was to minimize the interaction of lawyers with the media/press and to focus coverage on the real life stories of the plaintiff football players and their families. JA8101.
- h. The Master Administrative Complaint was filed on June 7, 2012. JA8102. On that day and in the days following, through the work of the PR Committee and the professionals at CLS, the NFL concussion lawsuit, featuring in large part the real life stories of retired NFL players

and their families, was prominently in the national news, including the following highlights:

- i. Kevin Turner on Good Morning America;
- ii. Mary Ann Easterling (widow of Ray Easterling) on CNN;
- iii. ABC Evening News with Dianne Sawyer;
- iv. Teleconference featuring Kevin Turner and Mary Ann Easterling, attended by reporters from CBS, ABC, NBC, ESPN, Fox, CNN, Bloomberg, Reuters, New York Times, Atlanta Journal Constitution, Philadelphia Inquirer, HBO Sports, Sports Illustrated, LA Times, Minneapolis Star Tribune, Richmond Times, Milwaukee Journal Sentinel, among others; and
- v. Prominent coverage by USA Today, LA Times, Washington Post, AP, Reuters, Sports Illustrated, Chicago Tribune, NPR, Atlanta Journal Constitution, and many more. JA8102.

The success of the PR rollout on June 7, 2012, was due in large part to careful, extensive and intensive planning and coordination. Mr. Tarricone played a leading role throughout. JA8102. He was involved in preparation of the talking points and other briefing materials to be used by all persons who would interact with the press/media on behalf of the retired players. JA8102-03. On June 6, 2012, in preparation for the rollout Mr. Tarricone personally coordinated “pre-briefings”

made by Mr. Tarricone, Mr. Weiss, Mr. Marks and Mr. Seeger to key, trusted media, including USA Today, LA Times, Bloomberg, Wall Street Journal, AP, Washington Post, ESPN, and Sports Illustrated. JA8103.

Additionally, the PR Committee was involved in coordinating and preparing the players and family members who would speak on the record—most notably Kevin Turner and Mary Ann Easterling—with respect to whom the Podhurst firm and Anapol Weiss played a major role in facilitating television and media appearances. JA8103.

The PR Committee's strategic media plan, which publically began with coverage of the Master Administrative Complaint filing, continued with virtually daily national coverage right up until the start of the NFL season, and then daily throughout the season, post-season, and thereafter. JA8103. It included numerous Op-Eds placed in influential papers, dozens of stories in both the sports and news media, and continued appearances by Mr. Turner, Mrs. Easterling, and others. JA8103. All of the work was overseen by Mr. Tarricone and Mr. Marks. JA8103. The other members of the committee remained engaged throughout and participated as well, especially Mr. Hagen and Mr. McGlamry. JA8103. Throughout the entire process, the PR Committee kept leadership, including Seeger, informed and engaged. JA8103.

By all accounts, the work of Mr. Tarricone and the PR Committee was extremely effective and instrumental in bringing the NFL to the settlement table. JA8103-04. Importantly, a substantial amount of Kreindler's common benefit time was spent pre-settlement, when the firm had no idea whether it would ever be compensated. Thus, the time Mr. Tarricone and the firm spent moving the case toward settlement was both extremely valuable to the resolution of the case and at risk of being uncompensated if the case was not successful.

The Common Benefit Fee Allocation Submission

During preparation of Mr. Tarricone's declaration filed as an exhibit to the initial petition for common benefit fees, Seeger Weiss demanded changes that reduced and downplayed the time spent by Kreindler for the common benefit of the plaintiffs and the impact of the contributions of Mr. Tarricone and the PR Committee to bringing the NFL to the settlement table; both of which resulted in a smaller allocation to Kreindler. JA8103, JA8104.

When Mr. Tarricone initially provided his signed declaration to Seeger's office, he was told to remove the language italicized below concerning the importance of his contribution to the successful settlement: "Partner Anthony Tarricone conceived, organized and directed the communications strategy for the litigation, *which was a carefully orchestrated effort that influenced the NFL to engage in settlement negotiations that culminated in the class settlement.*" JA8103,

JA8107-08. Mr. Tarricone—a team player—didn’t question Seeger’s motives at the time and removed the language as directed. JA8103. The watered down version of his declaration was then unfairly used to minimize his and Kreindler’s contribution and lowering the allocation to the firm.

Similarly, after submission of his initial signed declaration, Seeger Weiss directed Mr. Tarricone to delete 73.7 hours of partner and associate time, along with 6.7 hours of paralegal time, because the people who worked these hours did not each record at least 50 hours of time. JA8104. The work represented by these hours was accurately recorded time for common benefit work that was approved by leadership—as was all time submitted. JA8104. The value of this work is not included in the lodestar that was used in Seeger’s proposed division of fees. JA8104. Other firms who submitted time as part of the allocation of common benefit fees submitted time for individuals with less than 50 hours of total time and were compensated for them, but Kreindler took out the hours as directed by Seeger Weiss to be a team player, with the understanding that Seeger would require the same for all others. JA9155-56. It did not.

In his petition in support of his proposed allocation of common benefit fees, with regard to the contributions of Mr. Tarricone and Kreindler, Seeger reported 1,573 hours of common benefit time and \$1,258,400 in fees for Kreindler and proposed a multiplier of 1.25 for a total allocation of \$1,573,000. JA7951, JA7956.

Seeger stated only that “[w]orking closely with Co-Lead Counsel and his co-chair, Mr. Tarricone helped develop an effective media campaign to ensure the dissemination of accurate information to interested media, and counter misinformation concerning the Settlement to potential class members.” JA7951.

At the hearing relating to the fee allocation May 15, 2018, Mr. Tarricone essentially laid out an abbreviated version of the description of his efforts as co-chair of the PR Committee. JA9150-56. As he put it:

And the tide of public opinion turned against the NFL in a very big way by design. It turned against the NFL and turned on its head with a [sea] change [], the common view that people had of this litigation at its outset that was very negative to these players. And the tide of public opinion, the change, the [sea] change, didn’t just happen. It was because of the plan, the communications plan that you’ve heard about. I am the one who conceived it.

JA9150-51.

Throughout the hearing, including in response to Mr. Tarricone, Seeger repeatedly attempted to downplay the role of the PR Committee, stating “to stand here and act as if it was just some PR ploy or some PR case is just inaccurate”, JA9156, and

it’s not a PR case. This was a legal case at the end of the day and we had big issues. We had -- preemption was a big issue. If we survived that, we would have had other things and I think we all know there are many cases where the PR is great, but the case goes down in flames and this – this could have happened.”

JA9144. Seeger also failed to acknowledge that despite these legal issues, the NFL agreed to settle the case without production of a single document or a single deposition. Notably, Seeger also did not dispute that he removed valid common benefit time and references to the importance of Kreindler's contributions at the hearing. JA9157.

The Common Benefit Fee Allocation Order

In her order allocating common benefit fees dated May 24, 2018 (hereinafter the "Order"), Judge Anita Brody adopted Seeger's allocation and awarded Kreindler fees of \$1,491,097.30 for 1,573 hours and Seeger's proposed 1.25 multiplier. JA97, JA8984. In support of her determination, Judge Brody stated that "Co-Lead Class Counsel has also presented me with detailed information on his views related to the impact of the Communications Committee on the overall litigation." JA97, JA8984. Judge Brody also noted that "[o]ther than the firms that I appointed as Class Counsel and Professor Issacharoff, no firm will be paid more than the Kreindler firm. It is entirely clear to me that this payment is well-earned. It is equally clear to me that a higher multiplier is not appropriate." JA97, JA8984.

While she explicitly relied on Seeger's reporting of Kreindler's common benefit work, Judge Brody never addressed Seeger's demands that Kreindler remove reference to the importance of its contributions from Mr. Tarricone's

declaration, and remove about 80 hours of time, nonetheless whether those acts were appropriate.

SUMMARY OF ARGUMENT

Kreindler hereby adopts the Joint Appellants' Summary of Argument set forth in the Joint Opening Brief. Doc. 003113316560, p. 16.

In addition to the Joint Appellants' Summary of Argument, Kreindler sets forth the following Summary of Argument relating to its treatment in the Common Benefit Fee Allocation Order.

1. The district court improperly failed to consider Kreindler & Kreindler LLP Partner Anthony Tarricone's contributions in developing and implementing a media strategy early in the case while risk of failing to recover was high that was instrumental in bringing the NFL the bargaining table in granting Kreindler & Kreindler LLP a multiplier of only 1.25. In contrast, the court granted significantly higher multipliers to Seeger Weiss and other firms whose contributions mainly occurred after settlement was far more likely and risk of recovery had been reduced.
2. In addition, the district court made allocation of common benefit fees to Kreindler & Kreindler LLP without considering the fact that Seeger Weiss had asked it to remove approximately 80 hours of accurately

recorded common benefit work performed by individuals with fewer than 50 hours of common benefit time, while allowing other firms to submit and be compensated for work done by individuals with less than 50 hours of time.

STANDARD OF REVIEW

Kreindler hereby adopts the Joint Appellants' Standard of Review set forth in the Joint Opening Brief. Doc. 003113316560, p. 17.

ARGUMENT OF JOINT APPELLANTS

Kreindler hereby adopts and incorporates by reference herein the Argument of Joint Appellants set forth in the Joint Opening Brief. Doc. 003113316560, p. 17.

ARGUMENT OF KREINDLER & KREINDLER LLP

The district court assigned a multiplier of 1.25 to the lodestar for Kreindler based on Seeger's recommendation. That relatively low multiplier fails to meaningfully take into account the risk borne by the firm, given Mr. Tarricone's role in leading the PR Committee and devising the plaintiffs' highly effective media strategy during a time when the risk of failing to recover was high, which played a large part in bringing the NFL to the negotiating table. In contrast, the district court inflated the value of the work done by Seeger and others after settlement discussions had begun and compensation was far more likely.

In addition, in allocating common benefit fees to Kreindler, the district court failed to address or consider the fact that Seeger had unfairly demanded removal of time from Mr. Tarricone's declaration supporting the allocation proposed by Seeger in a manner that reduced Kreindler's allocation of common benefit fees.

I. THE DISTRICT COURT EMPLOYED AN IMPROPER ALLOCATION STANDARD, FAILING TO CONSIDER THE RISK FACTOR IN DETERMINING MULTIPLIERS, INCLUDING THAT OF KREINDLER

Even when a court has appointed various plaintiffs' attorneys to class-wide positions, including class counsel, "the district court has an independent duty under Federal Rule of Civil Procedure 23 to ensure that attorneys' fees are reasonable and are divided up fairly among plaintiffs' counsel." *In re High Sulfur Content Gasoline Products Liability Litigation*, 517 F.3d 220, 227 (5th Cir. 2008), citing *inter alia* Manual for Complex Litigation, Fourth, § 14.11 ("The court must distribute the [fee award] among the various plaintiffs' attorneys, which may include class counsel, court-designated lead and liaison counsel, and individual plaintiff's counsel.").

The factors that are to be considered when allocating common benefit fees, including in awarding a multiplier when a lodestar method is used, include the "risk of nonpayment" each attorney faced had the litigation not been successful and the "quality of performance", as well as the numbers of hours of work performed. *Lindy Bros. Builders, Inc. of Phila. v. Am. Rad. & Std. Sanitary Corp.*,

540 F.2d 102, 117 (3d Cir. 1976); *Glaberson v. Comcast Corp.*, No. CV 03-6604, 2016 WL 6276233, at *5 (E.D. Pa. Oct. 27, 2016). That is, the lodestar – number of hours – is but one of several factors that a court must take into account when assessing a fee application and considering the value of each firm’s “contribution” to the “ultimate success of the case.” *In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 2009 WL 4799954, at *23 (N.D. Ill. Dec. 9, 2009), order modified and remanded, 629 F.3d 741 (7th Cir. 2011); *In re Vitamins Antitrust Litig.*, 398 F. Supp. 2d 209, 225, 236 (D.D.C. 2005) (approving reduction of fee award from attorney fee pool because “[w]hat matters, in the contest of this fee dispute, is ... how [the case] did proceed, and what the firms’ contributions were, as the case proceeded with their involvement.”).

In addition to the value attributed to time expended, a factor that must be considered is the risk taken by the attorney making the fee application. *Lindy Bros. Builders*, 540 F.2d at 117. Was that attorney’s compensation contingent on success that might not occur, *id.*, or were the attorney’s contributions to the case made after most of the risk of litigation had been eliminated? *In re Copley Pharm., Inc., Albuterol Prod. Liab. Litig.*, 50 F. Supp. 2d 1141, 1155 (D. Wyo. 1999), *aff’d* and remanded sub nom. *In re Copley Pharm., Inc.*, 232 F.3d 900 (10th Cir. 2000) (applicant “became involved after the Court certified the class and shortly before trial” and thus “did not share the significant risks of other trial counsel who had

been involved in this case since its inception.”). The contributions of an attorney when success is undetermined may be the most important factor to consider in determining that attorney’s multiplier. *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 54 (2d Cir. 2000). While other courts have ruled that the risk must be viewed at the “outset of the case, when [the attorneys] committed their [resources]”, *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 488 (S.D.N.Y. 1998); *see also In re Diet Drugs*, 582 F.3d 524, 543 (3d Cir. 2009), this court has not yet determined whether it should “reconsider the risk of nonpayment as the action evolves.” *Diet Drugs*, 582 F.3d at 543.

As argued cogently by Locks Law Firm, proper consideration of the risk factors involved for the firms at issue “would not reward Mr. Seeger any more than other participating firms,” and if the risk is evaluated on an ongoing basis, his contributions are less important. Joint Opening Brief, Doc. 003113316560, p. 45.

In contrast, Mr. Tarricone, on behalf of Kreindler, became involved in coordinating a public relations and communications strategy in February 2012, shortly after the MDL transfer occurred, and months before the district court appointed any attorneys to represent the retired players. Crystalizing a coherent media strategy at that time, which was successfully rolled out at the time of the filing of the master administrative complaint just before the start of the NFL season, put a great deal of pressure on the NFL by creating negative coverage that

changed public opinion about the litigation and played a major role in bringing the NFL to the negotiating table. At the time Mr. Tarricone devised this public relations plan, and invested a great deal of time and resources in implementing it, the litigation was in its infancy and there was no guaranty that he would even be appointed to the Plaintiff's Steering Committee, nonetheless that his efforts would result in recovery.

While the district court appears to have credited Seeger's assessment that the contributions of the PR Committee were not that important to the case, it has done so without proper consideration of the risk shouldered by those who undertook those efforts when recovery was uncertain. JA 7956. Similarly, the district court incorrectly rewarded the efforts of Seeger and others granted higher multipliers, such as Levin Sedar & Berman, who made their contributions mainly after the NFL had started to negotiate a settlement. JA7956. Kreindler agrees with Seeger's statement at the May 15, 2018 hearing that there were significant legal challenges for the plaintiffs. If anything, these legal difficulties underscore the singular importance of the PR strategy in influencing the NFL to settle without a single deposition or document production.

In addition to his work with the PR Committee, Mr. Tarricone and Kreindler represented 250 retired NFL players with claims against the NFL relating to concussions. JA8105. Kreindler investigated each case and obtained the

information relating to each client's individual claim, including gathering documents and information concerning each player's NFL participation, gathering medical records concerning the player's medical condition, and, for deceased players, getting a family member appointed as the personal representative of their estate. JA8105. In addition, Kreindler regularly communicated updates to its clients to keep them notified regarding the developments in the litigation, settlement, settlement approval process, appeals process, and implementation of the settlement program. JA8105. All of these steps were taken in order to support the strength of the MDL and the class and build critical momentum without any guaranty of recovery.

For all of its efforts, Kreindler should receive a multiplier higher than the 1.25 awarded by the Court. Mr. Tarricone and the firm undertook key contributions to the case at a time when recovery was highly uncertain.

II. THE COURT CREATED NO RECORD AND ISSUED NO RULING ON KREINDLER'S OBJECTIONS TO SEEGER'S DEMAND TO EXCLUDE SOME COMMON BENEFIT TIME FROM ITS LODESTAR.

Kreindler made specific objection to the district court to the fact that Seeger Weiss demanded removal of 73.7 hours of attorney time and 6.7 hours of paralegal time, all of which were accurately recorded time spent for the common benefit work approved by leadership. JA8104. Seeger Weiss claimed this removal was necessary because no firm would be compensated for work done by any individual

who spent less than 50 hours of time on common benefit work. JA8104, JA8107-08. Other firms, however, were allowed to include and were compensated for work performed by individuals who did less than 50 hours of common benefit work.

As a result, Kreindler's lodestar was improperly depressed by Seeger Weiss's unfair actions of requesting that Kreindler reduce its hours based on rules that were not equally applied to all firms. Even though Kreindler raised this issue both in its written objections, JA8104, and at the May 15, 2018, hearing, JA9155-56, Seeger did not dispute it. JA9157. Similarly, even though the district court explicitly adopted Seeger's proposed allocation of fees to Kreindler, including time, the district court did not address Kreindler's objection either at the hearing or in its order allocating common benefit fees. Proper and fair consideration of the contributions of Kreindler should have addressed this issue.

CONCLUSION

In awarding Kreindler a 1.25 multiplier, contrary to prevailing caselaw, the district court failed to properly consider the contributions of Mr. Tarricone as the architect of the plaintiffs' PR strategy and leader of the PR Committee, at a time when recovery was uncertain, which were instrumental in bringing the NFL to the bargaining table, while inflating the value of work done by Seeger and others once the NFL had already shown a willingness to settle the case. In addition, by failing to address Kreindler's objection to Seeger's demand that it remove almost 80 hours

from its hours, the district court unfairly reduced Kreindler's compensation in its allocation.

Dated: September 9, 2019

Respectfully submitted,

/s/ Anthony Tarricone
Anthony Tarricone
Mass. State Bar No. 492480
KREINDLER & KREINDLER LLP
855 Boylston Street
Suite 1101
Boston, MA 02116
Phone: 617-424-9100
Fax: 617-424-9120
atarricone@kreindler.com

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 46.1(e), I hereby certify that I was admitted to the Bar of the U.S. Court of Appeals for the Third Circuit on July 31, 2008, and remain a member in good standing.

Dated: September 9, 2019

/s/ Anthony Tarricone
Anthony Tarricone
Counsel for Kreindler & Kreindler, LLP

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and this Court's June 11, 2019 briefing and scheduling order as it contains 4,892 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

Undersigned counsel also certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionately spaced 14-point Times New Roman typeface using Microsoft Word 2016.

Undersigned counsel further certifies pursuant to Local Appellate Rule 31.0(c) that the text of the electronic version of this brief is identical to the text of the paper copies, and a virus check was performed on the .pdf file of this brief using Symantec Endpoint Protection version 14 and no virus was detected.

Dated: September 9, 2019

/s/ Anthony Tarricone
Anthony Tarricone
Counsel for Kreindler & Kreindler, LLP

CERTIFICATE OF SERVICE

I certify that on September 9, 2019, a true and correct copy of the foregoing was filed using the Court's Electronic Filing System, which will send a Notice of Docket Activity to counsel of records for all parties.

Dated: September 9, 2019

/s/ Anthony Tarricone
Anthony Tarricone
Counsel for Kreindler & Kreindler, LLP